UNITED NATIONS

AT

Administrative Tribunal

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ADMINISTRATIVE TRIBUNAL

Judgement No. 767

Case No. 851: NAWABI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas at the request of Ehsan U. Nawabi, a former staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended the time-limit for the filing of an application to the Tribunal to 31 March 1995;

Whereas, on 31 March 1995, the Applicant filed an application requesting the Tribunal, inter alia:

"[To hold oral proceedings, and]

(a) To rescind the decision of the Secretary-General not to extend the Applicant's contract beyond 15 October 1993;

(b) To order the Applicant's immediate reinstatement with payment of full salary and applicable allowances and benefits from the date of his separation from service to the date of his reinstatement;

...

(f) To award the Applicant additional appropriate compensation to be determined by the Tribunal on the basis of the Applicant's statement of losses for the actual, consequential and moral damages suffered by the Applicant as a result of the Respondent's actions or lack thereof;

(g) To fix, pursuant to article 9, paragraph 1 of the Statute and Rules, the amount of compensation to be paid in lieu of specific performance at three year's net base pay in view of the special circumstances of the case;

(h) To award the Applicant as costs, the sum of $5,000.00 in legal fees and $500.00 in expenses and disbursements."

Whereas the Respondent filed his answer on 9 January 1996;

Whereas the Applicant filed written observations on 9 February 1996;

Whereas, on 2 July 1996, the Tribunal put questions to the Respondent, to which he provided answers on 10 July 1996, and on which the Applicant submitted comments on 12 and 22 July 1996;

Whereas, on 3 July 1996, the Tribunal put questions to the Applicant, to which he provided answers on 8 and 9 July 1996;

Whereas, on 4 July 1996, the presiding member of the panel ruled that no oral proceedings would be held in the case;

Whereas the facts in the case are as follows:

On 20 January 1992, the Assistant Chief, Professional Staffing Service (PSS), Office of Human Resources Management (OHRM), offered the Applicant a one year fixed term appointment, at the P-3 level, as a Civil Engineer with UNDOF. The appointment was to be "limited strictly to your service with UNDOF." On 4 February 1992, the Applicant accepted the offer.

On 28 February 1992, the Chief Administrative Officer, UNDOF, cabled the Chief, Field Personnel Section, Field Operation Division (FOD), as follows:

> "UNDOF now finalizing restructural preparations to achieve fifteen percent budget savings. We are planning to send proposal to HQ [Headquarters] not later than 15 March. If suggested proposals will be approved by HQ NY the post of Civil Engineer is not going to be needed. Would, therefore, suggest to postpone decision on recruiting Civil Engineer until UNDOF future organization has been decided on."

In a reply dated 29 February 1992, the Chief, Field Personnel Section, FOD, stated:

> "PRIMO Pleased to advise [the Applicant] now accepted offer and medically cleared for Civil Engineer post. We are attempting to foreshorten period of notice required by employer and will revert.
>
> "SECUNDO Your 224 on budget savings received. Please note that we shall not be proceeding with suggestion contained therein."

In a cable dated 2 March 1992, to FOD, UNDOF reiterated its suggestion that the assignment of the Civil Engineer to UNDOF should be postponed "until future reorganization had been decided on by HQ New York", as an engineer would no longer be required in UNDOF, if the proposals for reduction were accepted.

On 2 March 1992, the Chief, Field Personnel Section, FOD, requested the U.S. Army Corps of Engineers, the then employer of the Applicant, for his earliest possible release. On 9 March 1992, the U.S. Army Corps of Engineers advised the Chief, Field Personnel Section, FOD, that, although normally the Applicant would only be able to terminate his employment with effect from 30 June 1992, "Nevertheless, in consideration of your request and [the Applicant's] interest to join you soon, I have specified 31 March 1992 as the date of termination of [the Applicant's] employment."

On 17 March 1992, the Secretary-General approved UNDOF's plans to streamline operations. These included the abolition of the post of Civil Engineer which had been offered to and accepted by the Applicant.

The Applicant entered the service of the United Nations Disengagement Observer Force on 16 April 1992, on a one year fixed-term appointment as a Civil engineer at the P-3, step V level. On the same date, he arrived in Damascus, and on 21 April 1992, he reported for duty at UNDOF. At this time, he was informed by the Personnel and Travel Officer, that he had not been expected in Damascus, as the post of Civil Engineer had been abolished.

On the same day, the Applicant recorded, in a note for the file, the contents of his meeting with the Chief Administrative Officer. He sent a copy of the note to the Chief, Field Personnel Section, FOD. In this note, he expressed concern that he had "joined the UN in pursuit of a rewarding career advancement but, not to subject myself to uncertain employment conditions or my children to inferior educational standards." He noted that he had resigned a permanent position based on the offer and understanding that he would be working for at least one year as an engineer for UNDOF in Damascus; that based on satisfactory performance, the employment contract would be extended, and that suitable educational facilities existed in Damascus. He concluded by requesting that if he was to be considered for reassignment "I wish to be kept informed and consulted about the developments".

On 4 May 1992, the Applicant was assigned to UNDOF as Buildings Management Officer in the General Service Section. In a letter dated 30 June 1992, the Applicant informed the Assistant Chief, PSS, OHRM, that the post of Buildings Management Officer "requires neither professional nor engineering qualifications." He stated that "after resigning my employment in Germany, I had no choice but to proceed with the BMO [Buildings Management Officer] function as directed." He noted that "this was not the function for which I resigned a professional permanent post with the U.S. Government in Europe and arrived here to join the UN".

On 15 September 1992, the post of Buildings Management Officer was abolished. On the same day, the Applicant was informed of his reassignment to the Procurement Section, with effect from 16 September 1992. On 22 September 1992, the Applicant expressed his concern to the Assistant Chief, PSS, OHRM, about his career.

On 22 March 1993, the Chief Procurement Officer, UNDOF, proposed to the Chief Administrative Officer, UNDOF, that the Applicant's appointment be renewed for six months. On 23 March 1993, the Chief, Administrative Officer, UNDOF, informed the Chief, Field Personnel Section, FOD, inter alia, that "... we might find it

difficult to recommend further extension of [...] [the Applicant's] fixed-term appointment beyond six months ..."

On 31 March 1993, the Chief Administrative Officer, UNDOF, forwarded to the Chief, Field Personnel Section, FOD, the Applicant's Performance Evaluation Report, with an overall rating of a "very good performance".

On 8 April 1993, the Chief, Field Personnel Section, FOD, agreed to a six-month extension of the Applicant's fixed-term appointment. He requested that the Applicant be informed that "there would be no further extension beyond 15 October 1993." On 13 April 1993, the Applicant was so informed. He signed his Letter of Appointment on 10 May 1993, "with reservations".

On 22 April 1993, the Applicant wrote to the Director, FOD, requesting his assistance in resolving his situation. On 31 August 1993, the Chief Administrative Officer, UNDOF, informed the Applicant that there would be no further extension of his appointment, which would expire on 15 October 1993.

On 8 September 1993, the Applicant requested the Secretary-General to review the decision not to renew his fixed-term appointment beyond 15 October 1993. On 1 October 1993, the Applicant lodged an appeal against that decision with the Joint Appeals Board (JAB). At the same time, he requested a suspension of the administrative decision not to renew his fixed-term appointment. The JAB recommended granting the Applicant's request for suspension of action. On 14 October 1993, the Under-Secretary-General for Administration and Management informed the Applicant that the Secretary-General had decided not to grant his request for a suspension of action.

The Applicant separated from service on 15 October 1993.

The JAB adopted its report on the appeal on 28 June 1994. Its considerations, conclusion and recommendations read, inter alia, as follows:

"Considerations

23. The Panel quickly concluded that this was a case of non-observance by Respondent of Appellant's terms of employment. He was offered and accepted a post as a Civil Engineer. Respondent was fully aware before the date Appellant was due to leave his previous employment that the post he had been offered no longer existed, but no effort was made to so inform him and to give him the possibility of re-evaluating the offer of appointment. Having been negligent in this, Respondent proceeded to compound his error. Upon Appellant's arrival in Damascus, Respondent should have considered, and discussed with Appellant, the option of termination for abolition of post. There is no evidence that this was done.

...

25. On 16 September 1992, Appellant was assigned to another function for which he was even more patently overqualified. On 15 October 1993, after a six-month extension of his fixed-term appointment, he was separated from United Nations service. There is no indication that he manifested anything but good will to the United Nations as his employer throughout his brief career. There are indications that several United Nations officials assured him that, given satisfactory performance on his part and the availability of a suitable vacancy, he could expect continued employment with the United Nations. His one PER was for 'a very good performance.'

26. The Panel decided that Respondent could legitimately be charged with breach of contract and with negligence, if not impropriety, in this case. Appellant had, no doubt, been harmed, but the Panel was at least as concerned with injury to the United Nations itself. Any potential recruit to the United Nations hearing the facts of this case would indeed be foolish to accept a fixed-term appointment with the Organization. If steps are not taken to rectify such situations - instead of attempting to defend and justify them, the United Nations may one day find that it can no longer recruit and retain competent professionals.

Conclusion and Recommendations

27. The Panel ... concludes that Appellant has suffered monetary, psychological and professional injury, but it does not feel that it - or anyone else, for that matter - can establish an exact dollar value for the injury suffered by Appellant and, in all probability, his children. The recommendations made below constitute, however, a minimal appropriate compensation.

28. The Panel recommends that:

> (a) Appellant be issued a certificate of service which reflects the evaluation in his PER [performance evaluation report], and states that his separation was occasioned solely by the needs of the service and should in no way be considered as a negative reflection on his qualifications and competence; and
>
> (b) he be paid 18 months net base pay (dependency) at level P-3, step VI."

On 10 August 1994, the Officer-in-Charge, Department of Administration and Management transmitted to the Applicant a copy of the JAB report and informed him that the Secretary-General had decided to accept the JAB's recommendations.

On 31 March 1995, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Respondent violated the requirement of full disclosure by not informing the Applicant of the likelihood that his post would be abolished or that it had been abolished, prior to his relocation to Damascus.

2. The Respondent unilaterally amended the terms and conditions of the Applicant's contract of employment and did nothing to address the long term effects of the breach of that contract.

3. The compensation recommended by the JAB falls short as a remedy for the harm done; therefore, the Applicant should be awarded actual damages as well as punitive damages to deter further similar abuses of authority.

Whereas the Respondent's principal contentions are:

1. The Applicant was employed pursuant to a fixed-term appointment which carried no expectancy of renewal and which expired on its own terms.

2. The Applicant has adduced no evidence that the decision not to extend his fixed term appointment was improperly motivated or tainted by extraneous considerations.

3. The decision to award the Applicant 18 months net base salary as compensation for the serious irregularities in the recruitment of the Applicant was a valid exercise of discretion.

The Tribunal, having deliberated from 2 to 26 July 1996, now pronounces the following judgement:

I. The Applicant gave up his position with the United States Army Corps of Engineers in Frankfurt in order to take up his United Nations posting. Although this was a one-year, fixed term appointment, the Applicant makes the point that he had been told by the Chief of Field Personnel Section, FOD, that there were long-term prospects of continuing service at UNDOF, or elsewhere, in the United Nations.

II. The Applicant accepted the offer of appointment on 4 February 1992. On 28 February 1992, the question arose of the abolition of the Applicant's post, for budgetary reasons. Despite this, at the Organization's request, the date of termination of the Applicant's service with the United States Army Corps of Engineers was advanced to 31 March 1992. It was only on his arrival in Damascus, on 16 April 1992, that the Applicant was told that his post had been abolished, by a decision made on 17 March 1992. To add to his uncertainty, he was told to remain on travel status, pending clarification of the situation.

The Applicant was appointed to another post, which was also abolished on 15 September 1992. He was then appointed to yet another post, in the Procurement Section, which the Applicant

describes as being that of a trainee. The Applicant separated from service, on 15 October 1993, following one six-month extension of his appointment.

III. The Respondent argues that, in accordance with Staff Rule 104.12(b), the fixed-term appointment does not carry an expectancy of renewal, or of conversion to any other type of appointment. The Respondent also refers to the two fixed-term contracts signed by the Applicant, which stated that they did not carry any expectancy of renewal or of conversion. The Respondent further argues that a claim of renewal can only be valid if it is based on a firm commitment of renewal, revealed by the circumstances of the case, and these circumstances must be exceptional. He says that such circumstances are lacking in this case.

The Respondent also argues that, as the decision to renew a fixed-term contract is within the discretion of the Secretary-General, it can be challenged only if it is arbitrary, or tainted by caprice, prejudice, falsehood or any other extraneous factor. He contends that there is no evidence of improper motivation or extraneous considerations.

The Respondent states that the reason for non-renewal of the Applicant's appointment was the abolition of his post.

IV. While it is correct that the fixed-term appointment does not carry any expectancy of renewal or of conversion, the Tribunal notes that the Applicant left a career position to join the service of the Organization, having been told, not just once, that the prospect existed of continuation of his service, and that subject to satisfactory performance, he might have the opportunity of a career with the United Nations.

After the post had been abolished, the Respondent persisted in active recruitment of the Applicant, leading him to believe that there were career opportunities, as well as a post, in his field of

expertise. The Respondent knew, at the time of recruitment, that career opportunities for the Applicant had been virtually eliminated.

V. It is difficult, indeed impossible, to avoid a finding of falsehood and of great injustice, based on the fact that the Respondent allowed the Applicant to give up an alternative career, on the assumption that there was a genuine, secure one-year post awaiting him in Damascus, when the Respondent knew that this patently was not so.

VI. While the Tribunal agrees with the findings of the JAB, it concludes that, because of the egregious circumstances obtaining in this case, the Applicant should be awarded greater damages. Such circumstances include the entire manner in which the Applicant was treated from the outset, as well as the extent of the loss suffered by the Applicant as a consequence.

VII. The post which the Applicant held with the United States Army Corps of Engineers was a secure post with all its attendant benefits. He gave up this post on the assumption that he had been appointed to an existing United Nations position. Not only was the Applicant not told that this post had been abolished, but the Respondent expedited the Applicant's release from his United States Army employment. Had this not been done, the Applicant might have been spared the difficulties he faced with regard to his United Nations appointment. The Applicant should have been informed of the developments relating to the post for which he was recruited. It is reasonable to assume that, had he been so informed, he would not have taken the drastic step of resigning. Because of the Respondent's behaviour, the Applicant was denied a real choice between remaining in his post, or of resigning to face a very uncertain future. The security which the Applicant once enjoyed is gone and cannot be restored.

VIII. The Tribunal put questions to the Respondent in an effort to understand why the recruitment of the Applicant proceeded at all, why it proceeded on an expedited basis, and why the Applicant was not properly informed of the situation. The Tribunal also requested information as to what subsequent investigation, if any, was undertaken with regard to those responsible for these decisions, which were costly for the Organization, and much more costly for the Applicant.

The answers received by the Tribunal can only be characterized as cavalier. They suggest an apparent lack of realization of the seriousness of the harm suffered by the Applicant. There has apparently been no attempt to discipline those responsible. In answering the Tribunal's question in this regard, the Respondent merely says that there is a new procedure, expediting the process and facilitating better coordination in the recruitment of staff for field missions. This is an inadequate response in the light of what occurred.

IX. The non-renewal of the Applicant's appointment is not a violation of his right to expectancy of such renewal. Rather, it is a denial to the Applicant, during his short tenure with the Organization, of any opportunity to demonstrate his abilities in a post relevant to the skills and experience for which he had been recruited, on the promise that there was a possibility of a career with the Organization. This promise, which induced him into service, was entirely without foundation. No explanation has been offered as to why it was made, or of the motivation of those who made it.

X. For the foregoing reasons, the Tribunal:

A. (1) Rescinds the decision of the Respondent dated 15 October 1993;

(2) Orders that the Applicant be reinstated to a post comparable to that for which he was recruited, with full payment of salary and emoluments from the date of his separation, less his earnings from other employment in the interim.

B. Should the Secretary-General, within 30 days of the notification of this judgement, decide, in the interest of the United Nations, that the Applicant shall be compensated without further action being taken in his case, the Tribunal fixes the compensation to be paid to the Applicant at two years of his net base salary at the rate in effect on the date of his separation from service, in addition to the sum already paid to the Applicant, on the recommendation of the JAB.

All other pleas are rejected.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

Geneva, 26 July 1996

R. Maria VICIEN-MILBURN
Executive Secretary